

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1037

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Appellee

-against-

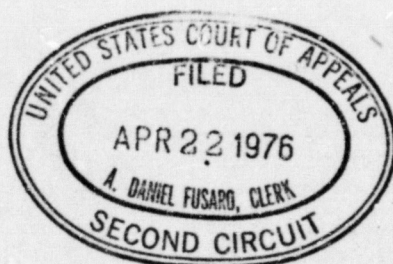
Docket No. 76-1037

SOLOMON BROVERMAN

Appellant

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BRIEF ON BEHALF OF APPELLANT
PURSUANT TO ANDERS v. CALIFORNIA



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PRELIMINARY STATEMENT UNDER
SECOND CIRCUIT RULE 28

The judgment herein was rendered after a jury trial before HON. THOMAS C. PLATT, District Judge, in the United States District Court for the Eastern District of New York, which found the appellant SOLOMON BROVERMAN guilty of Counts 1 and 2 of the indictment and judgment of conviction was entered on January 16, 1976.

STATEMENT OF THE ISSUE

The sole issue in this case is whether there are any non-frivolous issues on appeal.

STATEMENT OF THE CASE

The appellant SOLOMON BROVERMAN was indicted with LAWRENCE CESARE, WALLACE CASCIO and EUGENE SANTORE on a two count indictment charging in the first count the wilfull and unlawful possession of a quantity of women's garments stolen from an interstate shipment on or about March 3, 1972 in violation of Title 18, United States Code, Sections 659 and 2. The second count charged a conspiracy to commit the same offense and set forth two overt acts, all in violation of Title 18 United States Code, Section 371.

Trial commenced on Oct. 29, 1975. The first witness for the Government was one PAUL FLEISHER. FLEISHER admitted he was a thief and hijacker and had joined with a group of like characters to hijack a load of women's knitted garments belonging to a company called Arlene Knitwear Inc. He described the hijacking and then testified as to the problem of disposing of the stolen merchandise. He said he had approached the defendant SANTORE to see if he could find a buyer. SANTORE said that he would try, and then

produced the appellant BROVERMAN. The merchandise was delivered to BROVERMAN'S home on Barkey Street in Brooklyn, in a rented truck accompanied by a convoy of automobiles driven by the hijackers.

A price of \$7,700.00 was agreed upon and BROVERMAN paid the money in cash on the afternoon of that day. F.B.I. Special Agent RICHARD REDMAN testified as to the finding of boxes of the stolen property in BROVERMAN'S Barkey Street home. He also stated that the defendant CASCIO was BROVERMAN'S son-in-law and occupied the second floor apartment in that house.

One LUTHER WASHINGTON, the driver of the hijacked truck testified as to the facts of the hijacking. LARRY STEIN, President of ARLENE KNITWEAR INC., identified the boxes of knitwear as being among those on Washington's truck and that they were never seen after the hijacking. One JAMES STAFFORD, a special investigator for the New York Telephone Company testified as to telephone calls to AIRFREIGHT HAULAGE. LUCILLE WALTHER, an employee of RYDER TRUCK RENTAL, testified that one of the hijacker had rented the truck used to deliver the stolen merchandise to BROVERMAN using the name of HAROLD MARTER when the truck was rented. A bank employee then testified that the day the payments of \$7,700.00 were made by BROVERMAN, that he withdrew the sum from two savings accounts.

The defendant SANTORE and appellant BROVERMAN took the stand and testified in their own defense. The gist of their testimony was that they did not know the property purchased by BROVERMAN was stolen.

One problem arose on summation on behalf of the defendant SANTORE when he asked why the Government didn't call certain of the original hijackers as witnesses. The Assistant United States Attorney stated in his summation that the defendants had subpoena powers and remarked on the fact that the defense failed to call them.

The court charged the jury and the jury returned a verdict, acquitting CASCIO, and convicting SANTORE and BROVERMAN. Appellant BROVERMAN was convicted of both counts and sentenced to 2 years imprisonment on both counts, to run concurrently, and fined \$5,000.00 on each count for a total fine of \$10,000.00.

POSSIBLE ISSUES ON APPEAL

The sole issue in the trial was whether the appellant BROVERMAN knew the merchandise was stolen when he bought it. There was no issue as to whether the hijacking took place, although that was proven by the Government. Nor was there any issue as to whether the merchandise was stolen. Thus an issue of fact was presented as to BROVERMAN and that was resolved against him by the jury. BROVERMAN testified at length in his own behalf, stating substantially the defense that he did not know the merchandise was stolen. That was an issue of fact for the jury.

The only other issue which might be considered is the statement of the prosecutor that the defense had subpoena powers and his comment that they did not use them to call certain witnesses. That issue has been already resolved in the Second Circuit. It is settled law that the prosecutor may comment on the failure of the defense to call witnesses to contradict the

government's case, except in the case where the information not put into evidence by the defense is solely within the knowledge of the defendant. This would create an unfair comment on the defendant's failure to testify. United States v. LIPTON 467 Fed. 2d 1161 (2nd Cir) 1972, cert. denied 410 U.S. 927; United States v. D'ERCOLE, 225 Fed 2d 611 (2nd Cir.) 1955; United States ex rel Leak v. FOLLETTE, 418 Fed 2d 1266 (2nd Cir.) 1969, cert. denied 397 U.S. 1050, 1970.

As a practical matter the appellant BROVERMAN did take the stand in his own behalf so as to eliminate the exception to this rule.

There are no other non-frivolous questions of law which can be raised on appeal. All the other issues were issues of fact which were resolved against the appellant by the jury. Thus there are no non-frivolous issues on which to appeal.

CONCLUSION

For the above stated reasons there are no non-frivolous issues which can be raised on appeal. Accordingly it is respectfully requested that JOSEPH J. LOMBARDO be relieved as counsel on this appeal.

Respectfully submitted,

JOSEPH J. LOMBARDO
Attorney for Appellant BROVERMAN

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U. S. ATTORNEY

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